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SUPREME COURT, U.S.

MOTION FILED OCT 25 1956

IN THE

Supreme Court of the United States

October Term, 1956.

No. [redacted]5

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA AND THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF.

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between right and wrong action; it deals with "establishing principles of right and wrong in *behavior*" (Webster's Collegiate Dictionary, 5th Edition, p. 648). Are respondents contending that they may issue a license to those who hold opinions which *they* believe to be *right;* and may withhold a license from others whose views they conceive to be in error? Manifestly, they cannot, for freedom cannot survive upon such terms. If the ideas and associates of a licensee must be first submitted for approval by the state in order to obtain a privilege—*nay, in order to earn a living*—the ultimate result is that licensees (including perhaps those who borrow books from the public library, or ride to work on publicly owned street cars) will learn to have no ideas or associates. Such a condition is neither tolerable, nor democratic, nor constitutional.

The freedoms: speech, press and assembly are accorded a *preferred* place in our constitutional system, whoever may claim them, and the licensing power of the state may not be used to interfere with their exercise save in the face of a grave and iminent danger (*Saia v. New York*, 334 U. S. 558, 561). Even in the latter event statutory restraints upon First Amendment rights must be narrowly drawn, limited in scope to the evil at which it is directed, and utilizing standards by which the prohibited conduct may be ascertained as readily by the speaker as by the prosecutor or judge (*Winters v. New York*, 333 U. S. 507; *Saia v. New York, supra; Hennegan v. Esquire, Inc., supra*).

If petitioner's speech is punishable, it must be because it incites to unlawful action, and is uttered to attain this objective (*Chaplinsky v. New Hampshire*, 315 U. S. 568; *Kunz v. New York*, 340 U. S. 290; *Terminiello v. Chicago,*

337 U. S. 1). Yet approval of petitioner's application was withheld because, in respondents' words, his editorials *"consistently followed the Communist Party line,* and in doing so, violently attacked the Supreme Court of the United States and other government leaders *who acted contrary to Communist wishes"* (Op. Br. 6).[8] Not only are these glandular characterizations vague and meaningless (See *United States v. Hautau,* 43 F. Supp. 507, 508; *United States v. Lattimore,* 215 F. 2d 847, 849), but their employment here reveals how little understanding respondents have of the nature and scope of their powers.[9] Criticism of a court does not, of course, warrant suppression of speech unless and until it interferes with the performance of judicial duties, or is clearly in danger of doing so (*Pennekamp v. Florida,* 328 U. S. 331; *Craig v. Harney,* 331 U. S. 367; *Bridges v. California,* 314 U. S. 252). It is quite apparent that petitioner's comments were not measured in terms of their effect upon the judicial functions of the Supreme Court.

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[8]Op. Br. refers to Respondents' Brief in Opposition to Petition for Writ of Certiorari on file herein; the number cited refers to page therein where the reference may be found.

[9]It also indicates that respondents have overlooked history—for example the infamous Sedition Law of 1798, which *inter alia,* punished persons who attempted to destroy the confidence of the people in their officers, thus tending to sap the foundations of our government. Among those prosecuted and convicted under this law was Dr. Thomas Cooper, for his editorial attacks upon President Adams. The Judge who presided at his trial took particular exception to Cooper's statement that: "Our credit is so low that we are obliged to borrow money at eight per cent in time of peace." Cooper was sentenced to six months in prison, and fined $400.00. In later years, he served as a judge, a professor at Dickenson College and at the University of Pennsylvania, and finally, as the President of South Carolina College (Giles J. Patterson, *Free Speech and a Free Press* (1939 ed.), at pp. 136-137).

Likewise, if petitioner was punishable for his associations, it would only be because he had conspired to commit a crime (*Dennis v. United States*, 341 U. S. 494). But courts do not take judicial cognizance of such conduct (*Schneiderman v. United States*, 320 U. S. 118; *Ex Parte Fierstein*, 41 F. 2d 53, 54; *cf. Wieman v. Updegraff*, 344 U. S. 183; *Lanzetta v. New Jersey*, 306 U. S. 451), and the record is barren of any such evidence. True, there is some testimony in the record which puts petitioner in the Communist Party in 1942. But even if this were true, such membership was not then illegal; and indeed, in that year the Communist Party appeared on the ballot in many states.[10] Moreover, conceding that California has a legitimate interest in the security of its citizens in 1954 (or 1956), the State Bar does not indicate just how that interest is put in jeopardy by an alleged Communist Party membership in 1942.

Thus, petitioner's inability to obtain a license from California is also premised on guilt by innocent association—upon acts, connections and human relations fully innocent on their face and in themselves. Compare this approach to that of Judge Jeffries, the "Hanging Judge" of English history in the famous trial of Lady Lisle (11 Howell's State Trials, p. 298).

Lady Lisle was charged with high treason for harboring an alleged rebel soldier, one Hicks. Her defense was that she knew Hicks only as a Presbyterian minister who was wanted merely for "preaching in private meetings." She "did not in the least suspect him to have been in the

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[10]See dissenting opinion of Mr. Justice Black in *Jay v. Boyd*, 351 U. S. 345, at pp. 362, 363.

[rebel] army [of the Duke of Monmouth], being a Presbyterian minister that used to preach and not to fight." (*Ibid.*, p. 359.)

To this Lord Chief Justice Jeffries:

> "But I will tell you, there is not one of those lying, sniveling canting Presbyterian rascals, but one way or other had a hand in the late, horrid conspiracy and rebellion; . . . *their principles carry them to it* . . . "
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> . . . 11 Howell's State Trials, at p. 359.

Lady Lisle was convicted and hung, although four years later, Parliament "reversed" her attainder (*Ibid.* at p. 382.)

However, respondents go further than merely assessing character from past beliefs or associations. They are concerned, as well, with "whether he would write such *irresponsible* articles today" (Op. Br. 7, 9). Their contention seems to be that petitioner's refusal to dissociate himself from opinion and associates objectionable to respondents implies his continued adherenec to them; and therefore, presumably, he is not entitled to practice law in California [R. 34; Op. Br. 5-9]. Put another way, California claims the right to pasteurize the political opinions of any citizen coming to it for a privilege.

The answer to such an argument is that petitioner's beliefs and associations do not assume a different Constitutional posture merely because he seeks a license (*Hannegan v. Esquire, Inc., supra; Lawson v. Housing Authority, supra; Housing Authority v. Cordova, supra; cf. Wieman v. Updegraff, supra*). It is too obvious to deserve more than passing mention that if a state can claim the power to review the beliefs and associations of a lawyer merely

because he is a lawyer, asserting the privilege of being such, then it is equally tenable that the Sheriff may enter and search his house without a warrant because the Constitutional prohibition against illegal searches and seizures does not apply to lawyers as it does to other individuals.[11]

The freedom to express one's views is no transitory title dependent for its exercse upon whether or not its owner is seeking governmental favor; rather it is as inviolable a right of citizenship as loyalty is an obligation thereof. Therefore, petitioner should not be expected to disavow beliefs and associations which are not illegal. Yet, during the proceedings below, respondents cited an editorial in which petitioner states that:

> ". . . the truth about the world's daily events will be found only in such publications as the California Eagle, People's World, National Guardian [etc.]. . . ." [R. 110.]

and then asked petitioner:

> ". . . Is that still your position? . . . is that still a true statement? . . . Is it your interpretation that newspapermen have the right to print false statements?" [R. 111.]

In fact, it is significant that respondents postulate their "strongest" case upon an excerpt from one of petitioner's articles entitled "Lots of Plots" [R. 211, at p. 214], and offer it as the kind of "substantial evidence" which portrays him as an advocate of the forceful overthrow of government (Op. Br. 22). Yet, one searches that article in vain to discover so much as an intimation of what respondents presumably found there.

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[11]From concurring opinion of Justice Floyd in *Sheiner v. Florida State Bar* (1955), 82 So. 2d 657, 664.

The conclusion is inevitable that respondents manifest a distrust and suspicion of petitioner's political opinions because they happen to conflict with their own cherished beliefs. Respondents' error, therefore, is in ascribing to the vigour and unpopularity of petitioner's writings—to his independence of judgment—an immoral or unlawful conduct. Such error is the kind that invariably follows when governments trespass upon forbidden areas of conscience. Fortunately, neither the Constitution nor our concepts of justice and fairplay will suffer one's livelihood to be suspended upon the "slender reed" of conjecture or orthodoxy (*cf. Schneiderman v. United States, supra,* at p. 159; *Bridges v. Wixon,* 326 U. S. 135, 166; *Dickinson v. United States,* 346 U. S. 389, 397).

Conclusion.

The refusal of respondents to certify petitioner as eligible to practice law in California rests upon grounds which constitute a prior restraint upon his right to freely speak, think and associate. Respondents' decision should be reversed with directions to admit petitioner to the State Bar.

Respectfully submitted,

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